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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 77-1443

AMERICAN SECURITY COUNCIL
EDUCATION FOUNDATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

For The Capital Legal Foundation and the Southeastern Legal Foundation

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September 27, 1979

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On Petition For A Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

Memorandum of Amici Curiae in Support of Petition For Writ of Certiorari

For the Capital Legal Foundation and the Southeastern Legal Foundation.

INTEREST OF THE AMICI

The Capital Legal Foundation and Southeastern Legal Foundation are tax exempt, not-for-profit organizations which were formed for the purposes of engaging in non-partisan legal research and study and to provide legal representation for themselves and others in matters of public interest at all levels of the judicial process. The Foundations have a deep in-

terest in significant legal issues which are national in scope. The Capital Legal Foundation has recently been permitted to file a brief *amicus curiae* in this Court in *Industrial Union Department, AFL-CIO,* v. *American Petroleum Institute, et al.,* and *Marshall* v. *American Petroleum Institute, et al.,* Nos. 78-911 and 78-1036, October Term (1978), while Southeastern Legal Foundation has been permitted to file briefs *amicus curiae* in *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978); *Duke Power Co.* v. *Carolina Environmental Study Group, et al.,* 434 U.S. 939 (1978); and *United Steelworkers of America, AFL-CIO-CLC,* v. *Weber, et al.,* Nos. 78-432, 78-435 and 78-436,_____ U.S._____(1979).

Although the precise question of whether the American Security Council Education Foundation (ASCEF) presented prima facie evidence of a violation of the fairness doctrine is a narrow one, the majority decision of the Circuit Court, if allowed to stand, could effectively sound the death knell for the fairness doctrine. This doctrine, which was first established administratively by the Federal Communications Commission (FCC) thirty years ago, has since been codified into law by the Congress and affirmed by this Court in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). Under this doctrine, the right of the public to receive a variety of information and views on controversial public issues is paramount. The right to complain and have such complaints handled in a fair and impartial manner is an important corollary to this process.

These Amici believe that it is in the public interest to present the views expressed herein.

Amici have received written consent of all parties to file this pleading. Copies of these letters have been filed with the Clerk.

QUESTION PRESENTED

Did Petitioner ASCEF present prima facie evidence of a fairness doctrine violation in its complaint to the FCC?

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in ASCEF's petition for a writ of certiorari.

ARGUMENT

Any person who files a complaint with the FCC alleging a violation of the fairness doctrine must make a prima facie showing of such violation,[1] and the initial burden of presenting such evidence rests with the complainant.[2] The FCC concluded that ASCEF had failed ". . .to define precisely the specific issue of public importance presented . . .,"[3] and thus had not met the threshhold requirement. The Circuit Court affirmed ". . . because (1) the indirect relationships among the issues aggregated by ASCEF, under the umbrella of 'national security' do not provide a basis

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[1]*American Security Council Education Foundation* v. *FCC and United States of America,* No. 77-1443, Slip op., pp. 12, 13 footnote 24, (D.C. Cir. June 29, 1979).

[2]*National Citizens Committee for Broadcasting* v. *FCC.* 567 F.2d 1095, 1111(D.C. Cir. 1977); *cert. denied,* 436 U.S. 926 (1979).

[3]*Memorandum Opinion and Order,* 63 FCC 2d 366, 368(1977).

for determining whether the public received a reasonable balance of conflicting views, . . ."[4] In short, the FCC and the Court[5] found that ASCEF had presented a number of different though related issues, rather than one "national security" issue and dismissed the complaint.

This Court has clearly held in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), when construing the personal attack and political endorsement provisions of the fairness doctrine, that:

> "[T]here is nothing in the First Amendment which prevents the Government from requiring a licensee . . . to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." (at 389).

However, the fairness doctrine requirement that the complaint should identify the specific controversial issue of public importance was not formulated for use by artful communications law experts, but rather for "interested citizens"[6] who regularly or routinely watch television news and a portion of the public affairs programs of a given television station.[7] Where a broadcast licensee and a complainant may disagree about what issue was discussed in a particular broad-

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[4]*ASCEF* v. *FCC, supra*, slip op. at 18.

[5]The Court split six to three on rehearing en banc. However the majority opinion left no doubt that the several issues presented were controversial issues of public importance. *Id.*, at 21, footnote 38.

[6]*Fairness Report*, 48 FCC 2d 1, 8 (1974).

[7]*Id.*, at 19. *See: Peter C. Hurbst*, 48 FCC 2d 614, 615 (1974); *Alan C. Phelps*, 21 FCC 2d 12 (1969).

cast, the FCC's policy is to avoid ". . . sophistic distinctions entirely lost on the average viewer."[8] Clearly, whether a well-defined issue is stated in a complaint must be measured in terms of the interested citizens who make such complaints and whose rights as representatives of the public are at stake for, after all, ". . . [I]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, at 390.

In 1974, ASCEF published a report of its study called TV and National Defense, An Analysis of CBS News, 1972-1973.[9] In this study, written by Dr. Ernest W. Lefever, ASCEF supported its complaint that there had not been a balanced coverage of national security issues by CBS. When that study was released, it prompted rather widespread coverage in the printed media.[10] The media critics, scholars and other journalists who wrote about the study seemed to have little difficulty grasping the issue involved. For example, an article [11] in the *Journal* of Longview, Texas entitled "FCC-CBS Confrontation In Offing" reported on the study:

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[8]*Reconsideration of Fairness Report*, 58 FCC 2d 691, 697, n.8 (1976).

[9]*See* Joint Appendix at 8-13 (Hereinafter J.A.). The study was incorporated into the complaint filed with the FCC.

[10]*See* J.A. at 23. A reprint of these articles was incorporated by reference as Exhibit B into ASCEF's complaint filed with the FCC. *See ASCEF* v. *FCC, supra*, dissent, slip op. at 13, footnote 25. A copy of the reprint of these articles has been lodged with the Clerk's office by the Petitioner, since its size and shape was not appropriate for reprinting in the appendix to the petition.

[11]J.A. at 23.

> "The news story was the culmination of two years of study of how the CBS Evening News slants its telecasts in matters pertaining to *national security issues*, and it concludes that the bias is even worse than has been suspected." (Emphasis supplied).

In a column[12] entitled "Monitor of CBS Defense News Reveals Bias" syndicated columnist James J. Kilpatrick said:

> "They isolated every *reference to national security* over a two-year period, studied the transcripts, and tabulated their findings.
>
> * * *
>
> The same imbalance was found in coverage of other news in *the field of national security.*" (Emphasis supplied).

John Alexander, writing in the *Charlotte News*,[13] put it a bit differently:

> "It is a 200 page book complete with charts, statistics and footnotes to prove that CBS News virtually ignored a significant viewpoint on national defense shared by many Americans."

Not all of the coverage was favorable to the conclusions reached by ASCEF. The Washington Post's[14] Pentagon reporter wrote:

> "The report . . . undertakes a 'viewpoint analysis' —an attempt to categorize the slant of a news story in terms of how it portrays the threat to *U.S. security* principally from the Russians.
>
> * * *

[12] *Id.*
[13] *Id.*
[14] *Id.*

> The study strikes me as having several flaws. But its total thrust does raise some important questions for TV networks to consider." (Emphasis supplied).

Dr. Joseph P. Roche, in an article in *TV Guide*,[15] commented:

> "Next the inexorable Lefever breaks into three categories (A,B, &C) the *viewpoints toward national security.* A would be generally classified hard line; B, moderate; C, soft line. Without going into substance, I submit that Lefever has made a compelling case that the hard-line viewpoint never got an adequate hearing. (And I disagree with the hard-liners on many issues)." (Emphasis supplied).

The *St. Louis Post - Dispatch* editorialized that ". . . the public . . . is being exposed to a propaganda attack on the Columbia Broadcasting System for 'partial and slanted' television reporting of critical national defense issues. . .", while its rival, the *St. Louis Globe Democrat* contended ". . . (CBS) also appears to have been guilty of serious omissions of news that could have helped viewers form more balanced opinions, particularly in the area of national defense."[16]

The common thread of these comments by various journalists, regardless of their respective positions in the political-philosophical spectrum, is that the ASCEF study underpinning the fairness doctrine complaint here in question posits the issue[17] of na-

[15] *Id.*
[16] *Id.*
[17] Because the ASCEF study itself at times referred to national security "issues" (plural), the Court speaks of the umbrella concept of "national security." *ASCEF* v. *FCC*, *supra*,

tional security and whether its coverage by CBS was a balanced one. Even Chief Judge Wright, in his concurring opinion, conceded that ASCEF's study was well received by the many "academicians" who commented upon it,[18] though he was of the opinion ". . . that national security *by its very nature* simply cannot be reduced to a definable core."[19]

Judge Bazelon, in his concurring opinion, fears that ". . . applying the fairness doctrine to daily news coverage poses a serious threat to the independence of the broadcast press."[20] These two concurring opinions, when read together with the decision authored by Judge Tamm for the majority of the Court, make it apparent that the primary focus was on the *second* reason given for sustaining the action of the FCC that ". . .(2) a contrary result would unduly burden broadcasters without a countervailing benefit to the public's right to be informed."[21] The question of whether the complaint stated a definable issue was used as a vehicle to turn the fairness doctrine on its head. In his dissent, Judge Wilkey noted that "[I]f the position taken by the FCC and this court is sustained, it would be very difficult to make *any major issue* in American life the subject of a fairness complaint."[22] The issue, which the journalists and academicians clearly recognized, may be large, complex and

slip op. at 20. However, the issue as stated by ASCEF is whether this nation should do more, less, or the same about perceived threats to its national security. *Id.*, dissenting op. at 16.

[18]*ASCEF* v. *FCC, supra,* Wright, concurring op. at 9.

[19]*Id.* at 10 (Emphasis in original text).

[20]*ASCEF* v. *FCC, supra,* Bazelon, concurring op. at 1.

[21]*ASCEF* v. *FCC, supra,* slip op. at 18.

[22]*Id., Wilkey,* dissenting op. at 17. (Emphasis in original text).

difficult, both for the FCC and the broadcasters, but it clearly fits within the premise of the fairness doctrine that it is the ". . . paramount right of the public in a free society to be informed and to have presented to it for acceptance and rejection the different attitudes and viewpoints (on) vital and often controversial issues . . ."[23] As this Court clearly stated in *Red Lion Broadcasting Co.* v. *FCC, supra,* "[It] is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (at 390).

[23]*Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 1249 (1949).

CONCLUSION

For the foregoing reasons, Amici urge the Court to grant the petition for a writ of certiorari.

Respectfully Submitted,

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